86-445

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

JOHN SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Questions Presented

1. Whether there are no adequate and independent state grounds for the decision of the Court below?

2. Whether the New York Court of Appeals erroneously interpreted the Federal Constitution and incorrectly held that the respondent was denied his constitutional right to present his own defense?

3. Whether the New York Court of Appeals' approval of the respondent's desire to absent himself and defense counsel during trial created an unconstitutional and unworkable standard?

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Opinion Below

The opinion of the Court of Appeals of the State of New York, not yet reported, appears in the appendix hereto (pp. A1-A9).

Jurisdiction

The decision of the Court of Appeals of the State of New York was entered on July 10, 1986. This Court's jurisdiction is invoked under 28 USC §1257(3).

Constitutional Provisions Involved

Amendment VI of the United States Constitution provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Amendment XIV of the United States Constitution provides, in part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Statement of the Case

Introduction

For approximately a year and a half prior to the commencement of trial, the respondent had been represented by the Legal Aid Society throughout all of the pretrial proceedings, including suppression hearings, in spite of the fact that the society had apparently never before been assigned to a homicide case in Queens County.

At his arraignment on January 24, 1975 respondent declared that he would not have *any* lawyer appointed pursuant to Article 18-B of New York's County law and, referring to Lawrence Halfond of the Legal Aid Society, he said:

> Me and this man have a pretty good understanding. We're well affiliated with each other, and he understands what's happening, and I want him, Mr. Lawrence Halfond. He has put an awful lot of time and research in this case and helping me, and I would like him to continue.

On the morning of January 22, 1976, counsel for both sides, the court and a panel of 75 prospective jurors assembled to start the trial. Word came that the respondent refused to appear. At the afternoon session the respondent's trial attorney, Lawrence Halfond, read into the record the following statement from the respondent:

> "It is my specific and pointed direction to my counsel, Lawrence Halfond, Esq., and Peter D. Purvis, Esq., of counsel to William J. Gallagher, that they not participate in any fashion in the trial of indictment number 1430 of 1974. I have specifically instructed Mr. Halfond and Mr. Purvis not to be present at any stage of the proceeding. I have given this matter a great deal of consideration and have arrived at my conclusion, as above indicated, after my counsel fully explained that my actions might be considered a knowledgeable and voluntary waiver of my right to be present at the trial of the indictment. I feel that my constitutional rights have been abridged and trampled upon by the Queens District Attorney's Office and Mr. Justice Farrell, to the point where it is impossible for me to receive a fair and impartial trial as guaranteed by the Constitution of the United States and the State of New York. I am innocent of the charges, but I have already been convicted in the press. I want to make it absolutely clear that I am not a Black Muslim or a member of any Black Activist Groups, such as the BLA; but on the contrary, I am a firm believer in the Constitution of the United States and the laws of this country, but I believe that I am being railroaded here and that I am not receiving the equal protection of the laws, nor am I receiving due process of law."

Counsel then asked permission to withdraw or sit mute, which the court denied.

When trial commenced on February 3, the respondent told the trial judge that neither he nor his counsel would participate. He asked "to have them excluded as well as myself." The respondent said that he had no faith in the whole system, especially in Queens County, where everyone was under hypnosis by the District Attorney. "You formulate[d] your opinions, you passed judgment against me already. You know what you are going to do, so, therefore, all those little hypocrites that you put in the box here I have no anxiety [sic] to have them." The court directed counsel to defend, and the *voir dire* proceeded. After the court addressed the first panel of prospective jurors, the respondent stated that he was asserting the right to represent himself. Without ruling on that request, the court asked counsel to explain to the respondent that he could take counsel's place in any part of the proceedings, but both would not be permitted to act in any one instance. The respondent then asked permission to conduct his own defense completely, a request the judge granted. The judge directed counsel to let the respondent proceed himself but to remain on a standby basis to guide him. However, the respondent, insisted that counsel be excluded. The respondent also said he would remain mute. The judge at that point indicated his own understanding that, by asking to act for himself, the respondent had intended to participate actively. The judge directed that, while the respondent would be permitted to defend himself, if he received no answer from the respondent on anything, counsel was to confer with the respondent and participate on his behalf. Through counsel the respondent again replied that he would simply "sit mute" in the case.

When asked during *voir dire* to consult with the respondent, defense counsel replied that the respondent refused to exercise any sort of discretion in selecting the jury, and that "he wants to sit mute in the case." The court then ordered counsel to defend him, and jury selection, as well as the trial, went forward in this fashion. Halfond and Purvis represented respondent throughout the trial. While protesting counsel's participation because of the rigged system, respondent made clear that he found no fault with the two individuals; he stated that "these two men [were] qualified in every response in law."

After *voir dire* (consuming nearly 1,000 transcript pages) in which 103 prospective jurors were closely questioned by the District Attorney and Mr. Halfond, the trial continued over the following weeks, with counsel representing the respondent in the examination and cross-examination of witnesses. Nothing further was said of *pro se* representation. During the trial, both defense attorneys were zealous in their representation of the respondent, themselves calling eight witnesses (including a medical expert, a hair sample expert, a ballistics expert and a private investigator), making various motions (including several mistrial motions), and submitting requests to charge. The respondent at no time registered any complaint about the quality of the representation he received.

Nevertheless, the trial resulted in the respondent's conviction of the crimes of murder (two counts), attempted robbery in the first degree, possession of weapons as a felony and criminal possession of stolen property in the second degree. The respondent was thereafter sentenced to an indeterminate period of twenty five years to life as

well as lesser concurrent periods. These sentences were, however, to run consecutively with a previously imposed sentence.

On direct appeal to New York's Appellate Division, the conviction was affirmed. The New York Court of Appeals, however, reversed the conviction stating that the respondent had been denied his constitutional right to present his own defense, and remanded the case for re-trial. The case appeared on the trial calendar in Criminal Term, Queens County on July 31, 1986. At that time the respondent expressed his desire to be represented by Mr. Halfond of the Legal Aid Society during the new trial. The case is currently adjourned pending this Court's decision regarding this petition for a writ of certiorari.

POINT ONE

There Are No Adequate and Independent State Grounds for the Decision of the Court Below.

In reversing the respondent's conviction, the New York Court of Appeals engaged in a two-part analysis. First, it delineated the standard to be applied when a trial court considers a criminal defendant's invocation of the right to defend *pro se*. In doing so, the Court relied on two cases, to wit, *People* v. *McIntyre*, 36 NY2d 10 (1974) and *Faretta* v. *California*, 422 US 806 (1975). Second, the Court of Appeals concluded that the trial Court acted improperly inasmuch as it:

> . . . rejected out of hand, defendant's timely request to proceed *pro se* without determining whether it was

> knowingly or intelligently made or whether it was a good faith attempt to exercise his 'right . . . to determine his own destiny' (*People* v. *McIntyre*, 36 NY2d at p. 14, *supra*).

Although *People* v. *McIntyre* is cited by the Court of Appeals, this quotation is supported in the *McIntyre* opinion by citation to *Argersinger* v. *Hamlin*, 407 US 25 (1972); *Gideon* v. *Wainwright*, 372 US 335 (1963); *Powell* v. *Alabama*, 287 US 45 (1932), and *United States ex rel. Maldonado* v. *Denno*, 348 F.2d 12 (2d Cir., 1965). The Court of Appeals, in the instant case, went on to hold:

> Additionally, the Court compelled assigned counsel to participate and to take specific actions with respect to the conduct of the trial, under threat of contempt, despite defendant's contrary directions and repeated objections. By so doing, the trial court denied defendant his constitutional right to present his own defense (see *Faretta* v. *California*, 422 US 806, 835-836, *supra*; *People* v. *Vivenzo*, 62 NY2d 775, 776; *People* v. *Davis*, 49 NY2d 114, 120).

Importantly, this Court has held in *Michigan* v. *Long*, 463 US 1032, 1040-1041 (1983), that when "a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Thus, the mere existence of an alternative state ground does not deprive this Court of jurisdiction. The state court must have actually relied on the state ground as an independent basis for its disposition of the case. *See, Caldwell*

v. *Mississippi*, —— U.S. ——, 105 S.Ct. 2633, 2638 (1985). As delineated above, the opinion rendered by the New York Court of Appeals in the instant case rests upon the interweaving of state and federal law and thus no independent state ground exsits.

Moreover, "[i]f a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court reached." *Michigan* v. *Long*, 463 US at 1041, *supra*. This message was recently reiterated and sent directly to the New York Court of Appeals in *New York* v. *Class*, —— US ——, 106 S.Ct. 960, 964 (1986). This Court stated that, "[t]he opinion below makes use of both federal and New York cases in its analysis, generally citing both for the same proposition . . . The opinion lacks the requisite 'plain statement' that it rests on state grounds." Therefore, this Court found jurisdiction. Inasmuch as the New York Court of Appeals, in the wake of these decisions has again, in the instant case, declined to include a plain statement indicating its reliance on independent state grounds, this Court should similarly conclude that none exist, and that therefore jurisdiction exists for the granting of *certiorari*.

Finally, this Court has recognized that vacating the state court's decision and remanding the case to the state court for clarification as to its intentions has proven to be "unsatisfactory both because of the delay and decrease in efficiency of judicial administration" *Michigan* v. *Long*, 463 US at 1039, 1940, *supra*. Vacation and continuance for

clarification is especially inappropriate in light of the *New York* v. *Class* decision in which the New York Court of Appeals was specifically admonished to include an unambiguous "plain statement" of its reliance on an independent state ground if that is its intent. Its failing to do so in the instant case invites this Court to exercise its jurisdiction by granting *certiorari*.

POINT TWO

The New York Court of Appeals Erroneously Interpreted the Federal Constitution and Incorrectly Held That the Respondent Was Denied His Constitutional Right to Present His Own Defense.

After having requested at arraignment to be represented by Legal Aid attorney, Lawrence Halfond, prior to the commencement of *voir dire* the respondent requested permission to proceed *pro se*. The court granted the request subject to the sole restriction that both the respondent and standby counsel would not be permitted to act in any one instance. When the respondent subsequently insisted upon withdrawing completely from the jury selection process, the court had standby counsel participate on the respondent's behalf. At no time thereafter did respondent indicate a desire to participate in the proceedings against him or voice a protest to the role played by standby counsel. In fact, after *voir dire* nothing further was said of *pro se* representation.

Based upon the above facts, the New York Court of Appeals' decision holding that the respondent was denied his constitutional right to present his own defense rests

upon misplaced authority. The New York court relied on *Faretta* v. *California*, 95 S. Ct. 2524 (1975) to the exclusion of *McKaskle* v. *Wiggins*, —— US ——, 104 S. Ct. 944 (1984). Nevertheless, the *McKaskle* decision, in addition to being this Court's most recent pronouncement on the subject of the right to defend *pro se* and the role of court-appointed standby counsel, purports to further define and interpret *Faretta's* parameters. Thus, the New York Court of Appeals' failure to consider and apply the *McKaskle* standard to the instant murder case resulted in error worthy of this Court's review.

Faretta involved a situation in which the defendant was denied entirely the right to defend *pro se*. Furthermore, even his "request for leave to act as co-counsel was rejected, as were his efforts to make certain motions on his own behalf. Throughout the . . . trial, the judge required that [the] defense be conducted only through the appointed lawyer." 95 S. Ct at 2529. Under these circumstances, this Court held that Faretta had been deprived of his constitutional right to conduct his own defense. Importantly, this Court has since recognized that "*Faretta* dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement." *McKaskle* v. *Wiggins*, 104 S. Ct 944, 950 (1984).

The instant case is therefore distinguishable from *Faretta* inasmuch as, in the instant case, the trial court permitted the respondent to conduct his own defense completely, although it required assigned counsel to remain on a standby basis to guide him. The court's only restriction was that both respondent and standby counsel would not be permitted to act in any one instance. In *McKaskle*, this

Court framed its central issue as an inquiry into the "role [that] standby counsel who is present at trial over the defendant's objection may play consistent with the protection of the defendant's *Faretta* rights", 104 S. Ct. at 947. As such, the *McKaskle* opinion is closely on point and is therefore the applicable controlling authority.* *McKaskle* held that:

> . . . we make explicit today what is already implicit in *Faretta:* A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense. *Id.* at 954.

This Court also stated:

> [T]he *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to

* In *McKaskle*, "[w]hen pre-trial proceedings began, [the defendant] announced that he would be defending himself *pro se;* then he firmly requested that counsel not be allowed to interfere with [his] presentations to the court. [The defendant] reaffirmed his desire to proceed *pro se* on the following morning . . . and objected even to the court's insistence that counsel remain available for consultation . . . Later that morning [the defendant] requested that counsel not be allowed to assist or interrupt . . ." 104 S. Ct. at 948.

> control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is erroded . . . [T]he participation of standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself . . . [T]he right to appear *pro se* exists to affirm the accused's individual dignity and autonomy. *Id.* at 951.

In the instant case, although standby counsel was assigned to the respondent over his objection, the respondent was not denied autonomy nor the ability to control the presentation of a defense. He was, however, merely denied his request to forgo the presentation of *any* defense by absenting himself and defense counsel from the courtroom, or in the alternative, to be permitted to remain completely mute along with defense counsel, and in either case, to thereby relinquish all the autonomy and control that the trial court had afforded him. Granting this request would have resulted in nothing less than perverting what must be an adversarial criminal proceeding into an inquest. "The right of self-representation is not a license to abuse the dignity of the courtroom," *Id.* at 954.

The misplaced reliance by New York's Court of Appeals on *Faretta* is further illustrated by the recognition in *McKaskle* that "*Faretta* affirmed the defendant's constitutional right to appear on stage at his trial." *Id.* at 956. The respondent was by no means denied this right. Rather, the trial court respected and protected the respondent's right to proceed *pro se* pursuant to *McKaskle* while at the same time diligently safeguarded the defendant's right to due process and fundamental fairness. As such, contrary to the New York Court of Appeals holding, no constitu-

tional infirmity existed. The respondent's conviction was therefore erroneously reversed.

Finally, it is important to emphasize, as did the dissent in the Court of Appeals, that following *voir dire* the respondent at no time expressed a desire to participate as his own attorney or move in any way to have standby counsel silenced.* As this Court stated in *McKaskle:*

> A defendant who vehemently objects at the beginning of trial to standby counsel's very presence in the courtroom, may express quite different views as the trial progresses. Even when he insists that he is not waiving his *Faretta* rights, a *pro se* defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably. *Id.* at 953.

Thus, under the explicit language of *McKaskle*, the respondent's muteness following *voir dire* gives rise to the firm conclusion that standby counsel's participation in this case in no way undermined the respondent's right to proceed *pro se*.

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* Notably, on July 31, 1986, in a court appearance following the Court of Appeals decision, the respondent stated that upon retrial he wishes to be represented by Lawrence Halfond, the very same Legal Aid attorney who represented him at trial and who he claimed on appeal was foisted upon him to the detriment of his right to proceed *pro se*. Not only does such a request glaringly demonstrate how the respondent has manipulated the criminal justice system, but it also supports the argument that the respondent's quiescence following *voir dire* was borne of his satisfaction with the role played by, and quality of, standby counsel.

POINT THREE

The New York Court of Appeals' Approval of the Respondent's Desire to Absent Himself and Defense Counsel During Trial Created An Unconstitutional and Unworkable Standard.

By having approved of respondent's desire to absent himself and counsel during trial, the New York Court of Appeals has created an unconstitutional and unworkable standard. It is beyond peradventure that a criminal defendant may knowingly and intelligently waive his constitutional right to the effective assistance of counsel at trial, and even the right to trial itself. Nevertheless, these waivers do not include a concomitant waiver of due process or fundamental fairness, which are necessarily waived if both a defendant and his counsel are absent during trial proceedings. Moreover, the "inquest-like" proceedings that would result therefrom would undermine the American adversary system and, as such, would be constitutionally abhorrent. Finally, it is important to emphasize that the issues associated with a defendant's desire to absent himself and counsel completely from trial proceedings are novel, and thus, trial courts are urgently in need of this Court's guidance.

The Court of Appeals, by finding reversible error at trial, has implicitly approved of the defendant's desire to absent himself and defense counsel from the trial proceedings as a viable defense. In essence it recognizes "no defense" as a defense. It is submitted that this standard is unconstitutional. Although the courts have not had occasion to encounter this issue specifically, strong support

for this position may be drawn from decisions indicating that the absence of the defendant, even when counsel is present in court to defend, is unconstitutional. As this Court remarked more than a half century ago in *Snyder* v. *Massachusetts*, 291 US 97, 105-106 (1934):

> [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence . . .

Certainly, the absence of both defendant and counsel presents a more egregious affront to traditional notions of due process and fundamental fairness.

Moreover, the Court of Appeals' approval of "no defense" (*i.e.* absence of defendant and counsel) as a viable alternative is belied by this Court's decision in *United States* v. *Cronic*, —— US ——, 104 S. Ct. 2039, 2047 (1984) in which it was stated that, ". . . if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable". The firmness of this Court's belief in this principle has become manifest in a string of decisions in which constitutional error was found without a demonstration of prejudice when a defense attorney was either totally absent, or barred from helping the defendant during a critical stage of the proceeding. *See e.g., Geder* v. *United States*, 425 US 80 (1976); *Herring* v. *New York*, 422 US 853 (1975); *Brooks* v. *Tennessee*, 406 US 605 (1972); *Hamilton* v. *Alabama*, 368 US 52, 55 (1961); *White* v. *Maryland*, 373 US 59 (1963) (cited in *United States* v. *Cronic*, 104 S.Ct. at 2047 n. 25).

By its decision, the New York Court of Appeals has effectively rejected the aforementioned principles. It has gone so far as to establish a standard whereby a criminal defendant can properly waive the constitutional rights to due process and fundamental fairness. It is submitted that this standard is unconstitutional inasmuch as due process and fundamental fairness cannot be properly waived. These constitutional underpinnings must support all judicial proceedings. For example, even when a defendant waives his right to trial, due process and fundamental fairness must attend the entry of a valid guilty plea. Similarly, a "*pro se* defendant must generally accept any unsolicited help or hinderance that may come from the judge who chooses to call and question witnesses", *McKaskle* v. *Wiggins*, 465 US 168, 177 n.7 (1984). This is done to insure the presence of due process and fundamental fairness. Thus, this Court has tacitly acknowledged their non-waivability.

Furthermore, in recognition of the fact that a waiver of constitutional rights must be made knowingly and intelligently [*see e.g.*, *Johnson* v. *Zerbst*, 304 US 458, 464 (1938)], it is here submitted that a waiver of due process and fundamental fairness is improper because it cannot be done intelligently. Specifically, in the instant case, no benefit to the defendant could be derived by not appearing at trial, either personally or through his attorney. By doing so, the defendant would effectively preclude the possibility of an acquittal. One must therefore conclude that such a "strategy", even if knowingly made, can never be characterized as "intelligent".

Moreover, the integrity of our adversary system itself is implicated by a standard which permits a defendant to

completely withdraw from criminal justice proceedings. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free", *United States* v. *Cronic*, 104 S.Ct. 2039, 2045 (1984) *citing Herring* v. *New York*, 422 U.S. 853, 862 (1975).

> While a criminal trial is not a game in which participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators. *Cronic* at 2046, citing *US ex rel. Williams* v. *Twomey*, 510 F2d 634, 640 (7th Cir., 1975) *cert. den.* 423 US 576.

Permitting a defendant to absent himself and counsel from a courtroom while his trial is conducted presents far reaching constitutional infirmities. By doing so, a defendant would effectively supplant the adversary system in favor of an inquest, and thereby collapse the foundation of American jurisprudential integrity by obliterating its due process and fundamental fairness cornerstones.

It should also be stressed that the issue of whether a defendant may ever be permitted to absent himself *and* his attorney from trial is a novel one. Cases heretofore considered by this Court and the circuit courts in which a defendant was permitted to absent himself from trial did not also involve the absence of counsel from the courtroom. *See, e.g., Lewis* v. *United States*, 146 US 370 (1892); *Diaz* v. *United States*, 223 US 442 (1911); *United States* v. *Moore*, 466 F.2d 547 (3d Cir. 1972). Thus, lower courts are at present bereft of this Court's guidance as to the appropriate manner to respond to a request by a defendant to go entirely unrepresented at trial. As such, guidance is urgently needed.

Conclusion and Relief

WHEREFORE, for those reasons presented above, the petitioner respectfully requests that this Honorable Court either grant certiorari and hear this case or, in the alternative, summarily reverse the decision of the New York Court of Appeals.

Respectfully submitted,

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September, 1986

APPENDIX

Memorandum Opinion

STATE OF NEW YORK
COURT OF APPEALS

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

2 No. 212

The People of the State of New York,
Respondent,

v.

John Smith,
Appellant.

Jeffrey Stein & Philip L. Weinstein, NY Legal Aid, for appellant.

John J. Santucci, DA, Queens County (William Schrager of counsel) for respondent.

MEMORANDUM.

The order of the Appellate Division should be reversed and a new trial ordered.

Prior to jury selection in this case, defendant moved to proceed without representation of counsel. Without determining whether this request was knowingly and intelligently made, the trial court initially granted the motion, but thereafter ordered assigned counsel to take part in the proceeding after defendant indicated his intention to remain mute.

"A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right of counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*People* v *McIntyre*, 36 NY2d 10, 17; see *Faretta* v *California*, 422 US 806). When the right is timely interposed, the trial court should conduct a thorough inquiry to determine whether the waiver was made intelligently and voluntarily (*People* v *McIntyre*, 36 NY2d at p 17, *supra*). Likewise, when "a court feels that the motion is a disingenuous attempt to subvert the overall purpose of the trial * * * the proper procedure is to conduct a dispassionate inquiry into the pertinent factors" (*People* v *McIntyre*, 36 NY2d at p 19, *supra*).

Here, the trial court rejected, out of hand, defendant's timely request to proceed *pro se* without determining whether it was knowingly or intelligently made or whether it was a good faith attempt to exercise his "right * * * to determine his own destiny" (*People* v *McIntyre*, 36 NY2d at p 14, *supra*). Additionally, the court compelled assigned counsel to participate and to take specific actions with respect to the conduct of the trial, under threat of contempt, despite defendant's contrary directions and repeated objections. By so doing, the trial court denied defendant his constitutional right to present his own defense (see *Faretta* v *California*, 422 US 806, 835-836, *supra*; *People* v *Vivenzio*, 62 NY2d 775, 776; *People* v *Davis*, 49 NY2d 114, 120).

Dissenting

I cannot agree that, factually, defendant's several statements constituted a timely and unequivocal assertion of a right of *pro se* representation. Moreover, if defendant's conviction is to be upset on this basis, then denial of his right to put in no defense requires a commensurate remedy—that any retrial go forward with no defense. I would affirm the order below, and therefore respectfully dissent from the majority's holding both that the conviction must be overturned and that defendant must be granted a new trial at which he now can choose to be represented by counsel.

Defendant was convicted, after a jury trial, of two counts of murdering an off-duty police officer as well as other crimes. By the time of trial defendant—who had prior experience with the criminal justice system—had been represented for approximately a year and a half, through pretrial proceedings, by Legal Aid attorneys Lawrence Halfond and Peter Purvis. Indeed, Legal Aid had apparently never before been assigned to a homicide case in Queens County and the judge felt that for policy reasons he was unable to make the assignment, but defendant indicated that he would not cooperate with any attorney other than Halfond, and the head of the Legal Aid office consented to this deviation from policy. At his arraignment January 24, 1975 defendant declared that he would not have *any* 18-B lawyer and, referring to Halfond, said:

> Me and this man have a pretty good understanding. We're well affiliated with each other, and he understands what's happening, and I want him, Mr. Lawrence Halfond. He has put an awful lot of time and research in this case and helping me, and I would like him to continue.

On the morning of January 22, 1976, counsel for both sides, the court and a panel of 75 prospective jurors assembled to start the trial. Word came that defendant refused to appear. At the afternoon session, the following occurred:

> MR. HALFOND: If your Honor pleases, after an extensive interveiw with my client, extending over approximately two hours, I have been authorized to read the following statement into the record. Dated, of course, today's date, at the Queens House of Detention, at approximately 12:20 p.m., in the Counsel Room.
> "It is my specific and pointed direction to my counsel, Lawrence Halfond, Esq., and Peter D. Purvis, Esq., of counsel to William J. Gallagher, that they not participate in any fashion in the trial of indictment number 1430 of 1974. I have specifically instructed Mr. Halfond and Mr. Purvis not to be present at any stage of the proceeding. I have given this matter a great deal of consideration and have arrived at my conclusion, as above indicated, after my counsel fully explained that my actions might be considered a knowledgeable and voluntary waiver of my right to be present at the trial of the indictment. I feel that my constitional rights have been abridged and trampled upon by the Queens District Attorney's Office and Mr. Justice Farrell, to the point where it is impossible for me to receive a fair and impartial trial as guaranteed by the Constitution of the United States and the State of New York. I am innocent of the charges, but I have already been convicted in the press. I want to make it absolutely clear that I am not a Black Muslim or a member of any Black Activist Groups, such as the BLA; but on the contrary, I am a firm believer in the Constitution of the United States and the laws of this country, but I believe that I am being railroaded here and that I am not receiving the equal protection of the laws, nor am I receiving due process of law."

Counsel then asked permission to withdraw or sit mute, which the court denied, and the matter was briefly recessed. When trial commenced on February 3, defendant announced to the court that neither he nor his counsel would participate. He asked "to have them excluded as well as myself." Defendant said he had no faith in the whole system, especially in Queens County, where everyone was under hypnosis by the District Attorney: "You formulate[d] your opinions, you passed judgment against me already. You know what you are going to do, so, therefore, all those little hypocrites that you put in the box here I have no anxiety to have them." The court directed counsel to defend, and the *voir dire* proceeded. After the court addressed the first panel of prospective jurors, defendant stated that he was asserting the right to represent himself. Without ruling on that request, the court asked counsel to explain to defendant that he could take counsel's place in any part of the proceedings, but both would not be permitted to act in any one instance.

Defendant then asked permission to conduct his own defense completely, a request the judge granted. The judge directed counsel to let defendant proceed himself but to remain on a standby basis to guide him. Defendant, however, insisted that counsel be excluded, and that he would remain mute. The judge at that point indicated his own understanding that, by asking to act for himself, defendant had intended to participate actively; in the circumstances, the judge directed that, while defendant would be permitted to defend himself, if he got no answer from defendant on anything, counsel was to confer with defendant and participate on his behalf. Through counsel defendant replied that he would simply "sit mute" in the case. When

asked during *voir dire* to consult with defendant, counsel responded that defendant refused to exercise any sort of discretion in selecting the jury, "that he wants to sit mute in the case." The court then ordered counsel to defend him, and jury selection as well as trial went forward in this fashion. Halfond and Purvis represented defendant throughout the trial. While protesting counsel's participation because of the rigged system, defendant made clear that he found no fault with the two individuals; he stated that "these two men [were] qualified in every response in law."

After *voir dire* (consuming nearly 1,000 transcript pages) in which 103 prospective jurors were closely questioned by the District Attorney and Halfond, both sides delivered opening statements, and the trial continued over the following weeks, with counsel representing defendant in the examination and cross-examination of witnesses. Nothing further was said of *pro se* representation. Since defendant contends before us that there was only one error in the conduct of the trial after the jury was impaneled—claimed insufficiency of the evidence with respect to defendant's knowledge that the gun in his possession was stolen (see *infra* p 7, n *)— there seems little point to dwelling on the course of the trial, except to note that defendant's counsel were zealous in their representation of him, themselves calling eight witnesses (including a medical expert, a hair sample expert, a ballistics expert and a private investigator), making various motions (including several mistrial motions), and submitting requests to charge. It is no accident or omission that defendant at no time registered any complaint about the quality of the representation he received.

In these circumstances, defendant was not denied his constitutional right to represent himself.

The right to defend *pro se* being subject to restrictions, the present predicament—as well as the unenviable position into which the trial court cast itself, of likely error whatever it did—could have been obviated, or at least ameliorated, had the court simply followed the procedures outlined in *People* v *McIntyre* (36 NY2d 10), "to promote the orderly administration of justice and to prevent subsequent attack on a verdict claiming a denial of fundamental fairness." (*Id.* at 17.) The trial court made no finding that defendant's request was unequivocal and timely; it conducted no inquiry to determine whether defendant's waiver of the right to counsel was knowing and intelligent. And there was no finding as to whether defendant was engaging in obstreporous conduct, or whether his conduct was calculated to undermine, upset or unreasonably delay the progress of the trial, which would have forfeited defendant's right of self-representation. While the resolution of each of these key issues is open to significant question, and the failure to make findings is indeed regrettable, still on this record defendant's conviction should not be overturned.

The majority of this Court finds that this case falls squarely within the constitutional right of *pro se* representation identified in *Faretta* v *California* (422 US 806) and *People* v *McIntyre* (36 NY2d 10, *supra*). This conclusion, however, overlooks a factual record that, when read in its entirety, leaves one wondering exactly what defendant was seeking. Having succeeded in obtaining his choice of counsel (whose prodigious efforts were satisfactory to defendant), at the commencement of a complex murder

trial defendant sent in a statement insisting upon counsel's exclusion from the courtroom. At that time he asserted no right to make his own defense. At trial twelve days later, defendant both announced that he wished to "sit mute" and insisted that he wanted counsel "excluded as well as myself." After the first panel of prospective jurors was addressed, defendant asserted the right to defend himself (understood by the trial court to mean that he wished to participate actively), then repeated his demand to "sit mute" with counsel excluded. Indeed, it is not entirely clear from the transcript whether defendant's demands to be excluded or sit mute were limited to jury selection, or extended throughout trial, for after jury selection he made no further reference to this subject. The transcript shows that he appeared *pro se* with standby counsel, yet he at no point "expressly and unambiguously renewed his request that standby counsel be silenced." (*See, McKaskle* v *Wiggins*, 465 US 168, 183.)

As *McIntyre* instructs: "So that convicted defendants may not pervert the system by subsequently claiming a denial of their *pro se* right, the *pro se* request must be clearly and unconditionally presented to the trial court" (*id.* at 17). Moreover, "we deem a *pro se* application to be timely interposed when it is asserted before the trial commences (*People* v *Spohn*, 43 AD2d 843). At that juncture the court may conduct a thorough inquiry thereby averting delay and confusion. Once the trial has begun the right is severely constricted and will be granted in the trial court's discretion and only in compelling circumstances" (*id.* at 17). Defendant's demands were neither unambiguous or timely. Defendant made his first request —for exclusion of counsel from the courtroom—at the commencement of trial, when the court already had a panel

of 75 prospective jurors ready and had cleared its own calendar for the trial, and counsel for both sides were ready to begin. Given the circumstances, the trial court acted well within its discretion. "A system of justice must not only be just but sensible and practical. An experienced criminal defendant (this defendant had been convicted several times, including two felonies, and had permitted his attorney to represent him through the suppression hearing), should not be permitted to nullify a trial and require a new trial by the simple expedient of obstructing every effort of the court to assure to defendant his legal rights and a fair trial. There comes a point where a defendant must bear the consequences of his conduct, in a courtroom as well as out of it." (*People* v *Kelly*, 60 AD2d 220, 224, *aff'd on opn of Silverman, J.* 44 NY2d 725).

But even assuming that defendant's right of *pro se* representation has been violated, the relief awarded is unwarranted. In fashioning an appropriate remedy, "the overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society" (*People* v *Kelly*, 62 NY2d 516, 520; *see People* v *Tindle*, 61 NY2d 752, 754; *People* v *Santobello*, 39 AD2d 654). Having already had one error-free,* counseled trial, defendant should

* In all, three other errors are cited by defendant, none requiring reversal of the conviction. *First*, in view of the pretrial publicity focused on this case, it would have been desirable to conduct *voir dire* of prospective jurors out of the presence of other jurors, but failure to do so did not deprive defendant of a fair trial (*see, Murphy* v *Florida*, 421 US 794; *People* v *Genovese*, 10 NY2d 478). *Second*, permitting the father of a policeman to serve as a juror in a case involving the death of an off-duty officer on this record did not constitute reversible error. Where a relationship does not fall within CPL 270.20(1), whether or not to sustain a challenge for cause rests within the discretion of the trial court (*see, People* v *Harris*, 57 NY2d 335; *People* v *Provenzano*, 50 NY2d 420; *cf., People* v *Culhane*, 33 NY2d

(footnote continued on next page)

not now be permitted to choose to be represented by counsel at retrial. Defendant should be granted no more than what he sought from the trial court and what we now conclude was improperly denied him: an uncounseled trial at which he is excluded from the courtroom. This would, consistent with due process (*see, Santobello* v *New York*, 404 US 257, *on remand* 39 AD2d 654), place defendant in the position he would have occupied had the error identified by the majority not been committed.

* * *

Order reversed and a new trial ordered in a memorandum. Judges Meyer, Simons, Alexander and Titone concur. Judge Kaye dissents and votes to affirm in an opinion in which Chief Judge Wachtler and Judge Hancock concur.

Decided July 10, 1986

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90). Here, the court did not abuse its discretion as a matter of law in refusing to disqualify the juror. The fact that a juror has a relative in the same profession as the victim does not in and of itself constitute bias; and the juror, upon thorough inquiry by counsel for both sides, affirmed his impartiality. *Finally*, viewing the evidence in a light most favorable to the People, as we must, the proof was sufficient to establish defendant's knowledge that the gun in his possession was stolen (*see People* v. *Zorcik*, 67 NY2d 670; *People* v *Reisman*, 29 NY2d 278, 285, *cert denied* 405 U.S. 1041; *People* v *Colon*, 28 NY2d 1, 13).